STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2014
v	No. 307858 Otsego Circuit Court
JAMES JOSEPH PLATTE, JR., Defendant-Appellant.	LC No. 09-003995-FC

Before: MARKEY, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder Dianna Horridge (AWIM), MCL 750.83, failure to stop at the scene of an accident resulting in serious impairment or death, MCL 257.617(2), and aggravated domestic assault of Dianna, MCL 750.81a(2). The trial court sentenced defendant as a fourth habitual offender to 30 to 50 years in prison for the AWIM conviction, 30 to 50 years in prison for the failure to stop conviction, and 2 to 15 years in prison for the aggravated domestic assault conviction. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a traffic accident involving defendant and his girlfriend, Dianna, in Gaylord, Michigan on the night of August 27, 2006. Dianna and defendant left a bowling alley that night in Dianna's 1993 Jeep Grand Cherokee. On Gornick Avenue, which turns into Springwood, Dianna stopped at a stop sign. As she went through the intersection, defendant put her stick shift Jeep in neutral and took her keys. He was angry. Dianna coasted to the first driveway on the right and stopped.

Next, defendant yanked Dianna out of the Jeep. She hit her head on the vehicle, felt lightheaded, and could not see. Defendant put Dianna in the passenger's seat and almost shut the door on her feet. He backhanded her twice on the forehead. Dianna testified that the large ring on defendant's finger caused blood to rush down her face after the first hit.

Gerald Eugene Vary, II, was also driving on Gornick Avenue and, as he pulled away from the stop sign, the Jeep "peeled out" in front of him and "burnt out the gravel underneath." Vary recalled that the driver entered the roadway "kind of like crazily" and "all over the road." The driver was leaning "almost all the way into the passenger's side." The driver regained control temporarily and Vary followed at about 40 miles an hour. Then, up the road, the driver

accelerated "right into a patch of trees." Vary did not see any brake lights and the vehicle did not swerve. Vary testified that he was sure the driver was a man.

Dianna was not wearing a seatbelt. When she saw the trees in front of them, she braced herself by grabbing the passenger's side door and "metal consul" and putting her feet on the dashboard. Defendant said, "Let's see if we can make it through this" or something similar. Dianna did not feel defendant brake. Dianna's next memory was waking up, crashed into the trees.

Terry Mitchell and teenagers Tiffany Showalter, David Showalter, and Justin Wright lived in a trailer home on Springwood, next to the trees where the crash occurred. They all heard the crash and went outside to the porch.

Justin heard a woman screaming, "Get out of the vehicle. Get out. Get out of the car. Get out of the car." Tiffany saw two people. Defendant was in the driver's seat with his head on the steering wheel. He was trying to start the vehicle. Dianna was outside of the vehicle—hysterical and covered with blood. When Tiffany told Dianna she was calling 9-1-1, she was "frantic." She said, "we don't have insurance. I don't want you to call 911." Dianna tried to take the phone from Tiffany. Tiffany heard Dianna tell defendant that "she loved him." Tiffany recalled that defendant replied, "F*** love. We should have died together." Justin also recalled that defendant said, "To F with love. You know, we should have died. We should have died together."

Justin saw defendant climb out of the driver's side window. He was "very angry" and covered with blood. Defendant pursued Dianna, but Tiffany and Terry brought her inside the trailer. Defendant fled on foot when they heard sirens.

Afterwards, Dianna reported to medical professionals that defendant drove 35 to 45 miles an hour into a tree and she was not wearing a seatbelt. Defendant, on the other hand, told police that Dianna was driving, they argued, and he hit her repeatedly. Defendant explained that the accident occurred when he grabbed the steering wheel, said, "See if you can survive this one," and Dianna's foot got stuck on the gas pedal.

Blood samples were recovered from the Jeep. The samples from the front passenger's side head rest, the passenger's seat, and the passenger's side door handle matched Dianna's DNA. The samples from the driver's side door frame on the outside of the Jeep, the driver's side vent window, the driver's seat near the console, and the steering wheel horn matched defendant's DNA.

Defendant was charged with AWIM, failure to stop at the scene of an accident resulting in serious impairment or death, and aggravated domestic assault. His first trial resulted in a hung jury. Defendant represented himself during a portion of the first trial and the trial court held defendant in contempt of court several times—for "giving the finger to the Prosecutor" and telling defense counsel William Slough "to get the F away from [defendant]." He was subsequently sentenced to 93 days in jail for those offenses. Before the second trial, defendant again attempted to waive his right to counsel, but the trial court denied defendant's request to

represent himself based on his prior "hostile and aggressive" behavior. Defendant thereafter waived his right to be present at trial.

At the second trial, the prosecutor and defendant called experts who provided conflicting opinions regarding who was driving the Jeep at the time of the crash. The jury convicted defendant as charged.

II. ANALYSIS

A. "VICTIM" REFERENCES

Before trial, defendant moved to prohibit references to Dianna as "victim" in front of the jury. The trial court relied on a dissent in *People v Guster*, 474 Mich 1115; 712 NW2d 162 (2006), in which Justice Kelly recommended the victim be referred to as a complainant, and ordered that Dianna similarly be referred to as "complainant."

Defendant correctly points to instances in the jury trial transcript where the prosecutor and witnesses referred to Dianna as "victim," which was contrary to the trial court's pretrial order. On six occasions, the prosecutor corrected himself on the record, and on one occasion, a witness corrected himself. The remaining references by the prosecutor and witnesses were not corrected, defense counsel made no objections to them, and the trial court did not provide curative instructions following each reference based on its pretrial order.

On appeal, defendant argues that the prosecutor erred by referring to Dianna as "victim," the trial court erred by failing to *sua sponte* enforce its own pretrial order, and defense counsel was ineffective by failing to object to the references. We find no error requiring reversal.

Review of defendant's unpreserved challenges is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Ultimately, reversal is only warranted where defendant was actually innocent, or an established error "'seriously affected the fairness, integrity, or public reputation of judicial proceedings[.]'" *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004), quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). If a curative instruction could have alleviated any prejudicial effect of a prosecutor's error, reversal is not warranted. *Ackerman*, 257 Mich App at 449.

Whether defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v Herron*, 303 Mich App 392; ___ NW2d ___ (2013). A trial court's findings of fact, if any, are reviewed for clear error and issues of constitutional law are reviewed de novo by this Court. *Id.*

Defendant has not established that the prosecutor's violation of the pretrial order and the trial court's failure to enforce the pretrial order affected his substantial rights. As the People argue, Dianna is a victim. A "victim" is "a person who suffers from a destructive or injurious action or agency." *Random House Webster's College Dictionary* (2001). Dianna was the victim of a car accident regardless whether defendant caused the accident. Moreover, defendant admitted to the police that he hit Dianna on the night of the accident. Therefore, she was also the victim of domestic violence.

Additionally, the trial court's instructions alleviated any prejudicial effect of the references to Dianna as "victim." *Ackerman*, 257 Mich App at 449. The trial court instructed the jury that defendant was presumed to be innocent. It also instructed the jury regarding the elements of each crime, which the prosecutor was required to prove beyond a reasonable doubt to find him guilty. The jury took an oath "not to let sympathy or prejudice influence" its decision. The jury was presumed to follow its instructions. *People v Powell*, 303 Mich App 271, 274; 842 NW2d 538 (2013).

Defendant cannot establish that he was denied the effective assistance of counsel by the failure to object to the references to Dianna as "victim." Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "To prove defendant received ineffective assistance of counsel, he must show: (1) that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance." *People v Roscoe*, ___ Mich App ___; ___ NW2d ___ (2014) (quotation marks omitted).

Defense counsel possesses '"wide discretion in matters of trial strategy,"' *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), quoting *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and defendant must provide evidentiary support overcoming the presumption of trial strategy and excluding "hypotheses consistent with the view that his trial lawyer represented him adequately." *Ginther*, 390 Mich at 443; *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant failed to properly move for a *Ginther* hearing and has failed to provide any evidentiary support to overcome the presumption of trial strategy here.[1] Defense counsel may have reasonably chosen not to object and draw the jury's attention to the references to Dianna as "victim," see *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) (there are times when it is better not to object and draw attention to unfavorable evidence), and in light of the overwhelming evidence that defendant caused the crash and assaulted Dianna, defendant cannot establish that the outcome of the proceeding would have been different if defense counsel had objected to the references.

B. PRIOR-ACTS EVIDENCE

Next, defendant argues that his prior acts were improperly admitted at trial to show his character and propensity to commit the crime. We disagree.

Because defendant objected to the admission of the prior-acts evidence before his first trial and then objected to the prosecutor's notice of intent incorporating the prior-acts evidence admitted at the first trial, and the trial court ruled the evidence was admissible under both MCL 768.27b and MRE 404(b), we will treat defendant's argument on appeal as preserved. A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). An abuse of discretion occurs

[1] Defendant alternatively requests for remand for a *Ginther* hearing, but defendant failed to meet the motion filing requirements of MCR 7.211(C)(1).

when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013).

The prosecutor offered the following prior acts at trial:

- **Phone Call Incident:** Dianna testified that, when defendant was arguing on the phone with his father, her son started screaming and she told him to be quiet. Defendant thought Dianna was talking to him. He grabbed her by the collar and slammed her on the floor. He told her never to tell him to be quiet again. As she tried to explain herself, defendant suddenly "snapped right out of it" and apologized, promising "he'll never do it again."

- **Visitation Incident:** In November or December 2003, defendant became very controlling. Dianna testified that defendant would not allow her to work or "go anywhere," including taking her son to visitation with his father. After Christmas 2003, she was about four to five months pregnant. She asked to go with defendant to pick up her son from visitation with his father. Defendant shoved her on the bed, causing her stomach to hurt. She wanted to go to the hospital. Defendant accused her of lying and "pinned" her between the dresser and the closet. Then, he slapped her numerous times. Her stomach hurt. She ran to the bathroom and curled up. Defendant slapped her again and called her a "bitch" and a "liar." Again, afterward, defendant "snapped right out of it, he was fine." He apologized, crying.

- **Wal-Mart Incident:** In July or August 2006, Dianna and defendant drove to Wal-Mart for carpet cleaner. On the way, they had an argument. In the parking lot, Dianna tried to exit the vehicle and defendant grabbed her from the passenger's seat and pinned her against the driver's side door. Dianna did not go into the store and just headed home. On the way, defendant said she "might as well take him to jail." When he thought she was actually doing so, he punched the dashboard and screamed. Defendant broke the rearview mirror. Dianna slammed on the brakes and hit a street sign. A passerby asked if everything was okay and defendant yelled at him and threw the side mirror at him.

- **Attempted Rape:** On August 18, 2006, Dianna was late getting home because she got lost. Defendant was waiting for her on the porch. He claimed she lied about getting lost. He choked her and pounded her head against the wall. Then, he ripped her clothes off. He said, "If you want to be F'd, I'll give you F'd." Dianna was afraid he was going to rape her. Afterward, defendant snapped out of it and apologized.

MCL 768.27b provides, in pertinent part:

> (1) Except as provided in subsection (4) [acts occurring more than 10 years prior], in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible *for any purpose for which it is relevant*, if it is not otherwise excluded under Michigan rule of evidence 403. [Emphasis added.]

In *People v Cameron*, 291 Mich App 599, 609; 806 NW2d 371 (2001), this Court stated:

> The language of MCL 768.27b clearly indicates that trial courts have discretion "to admit relevant evidence of other domestic assaults *to prove any issue, even the character of the accused*, if the evidence meets the standard of MRE 403." [Citation omitted, emphasis added]

Michigan Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In terms of probative value, evidence of prior acts of domestic violence "can be admitted at trial because 'a full and complete picture of a defendant's history . . . tend[s] to shed light on the likelihood that a given crime was committed.'" *Cameron*, 276 Mich App at 610, quoting *People v Pattison*, 276 Mich App 613, 620; 741 NW2d 558 (2007).

> The "unfair prejudice" language of MRE 403 "'refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" Moreover, admission of "[e]vidence is unfairly prejudicial when . . . [the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury." [*Cameron*, 291 Mich App at 611 (quotations and footnotes omitted).]

The prior acts admitted at trial provided a more complete picture of defendant's history and were relevant to the interaction between defendant and Dianna before and after the accident. As the trial court found, the prior acts of abuse against Dianna tended to prove that he would abuse her again. When defendant became angry with Dianna, he would lash out violently. Just as the argument in the car on the way to Wal-Mart resulted in defendant abusing Dianna, the jury could infer defendant became violent after the argument in the car on the way home from the bowling alley.

Furthermore, from the escalation of abuse from shoving to hitting to attempted rape, a reasonable juror could infer that, with the last incident in the Jeep, defendant intended to kill Dianna. The prior acts of abuse also demonstrated that defendant had a tendency to grow angry, act out in violence against Dianna, and then "snap out" of it and apologize. The jury could infer that Dianna pleaded with Tiffany not to call the police and repeatedly told defendant she loved him after the accident because she expected him to "snap out" of it again.

The trial court properly concluded that the probative value of the prior-acts evidence was not substantially outweighed by the danger of unfair prejudice. The prior acts were not required to be identical, *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011), but they all nevertheless involved the same abuser and victim. As the prosecutor argued below, any evidence offered by the People against defendant would be prejudicial. The prior acts did not "stir such passion" that the jury was unable to consider the merits of the case. *Cameron*, 291 Mich App at

611. The jury was presumed to follow the instructions for considering the evidence in this case and not to convict defendant solely because he was guilty of other bad conduct. Therefore, the probative value—evidencing the nature of the relationship between defendant and Dianna and assisting the jury in assessing the credibility of Dianna and the eyewitnesses—substantially outweighed any unfair prejudice. Therefore, the trial court did not abuse its discretion when it admitted the prior-acts evidence under MCL 768.27b.

Because the prior-acts evidence was admissible under MCL 768.27b and meets the standard of MRE 403, we need not address whether the trial court correctly admitted the evidence under MRE 404(b) as well.

C. SELF-REPRESENTATION

Defendant also argues on appeal that he was denied the right of self-representation. We disagree. This Court reviews de novo questions regarding the constitutional right to self-representation and the right to counsel. But a trial court's factual findings are reviewed for clear error. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004); *Herron*, 303 Mich App 392.

Criminal defendants have a constitutional and statutory right to self-representation. Const 1963, art 1, § 13, and MCL 763.1. This right is not absolute. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976); *Indiana v Edwards*, 554 US 164, 171; 128 S Ct 2379; 171 L Ed 2d 345 (2008). The right to self-representation conflicts with the right to counsel. *People v Adkins* (*After Remand*), 452 Mich 702, 720-721; 551 NW2d 108 (1996), overruled in part on other grounds by *Williams*, 470 Mich at 641 n 7. "In balancing these two essential but potentially conflicting rights, a court must 'indulge every reasonable presumption against waiver' of the right to counsel, and should not allow a defendant to proceed without counsel if any doubt casts a shadow on the waiver's validity." *People v Brooks*, 293 Mich App 525, 537; 809 NW2d 644 (2011), overruled in part on other grounds 490 Mich 993; 807 NW2d 303 (2012), quoting *Williams*, 470 Mich at 641. A defendant who chooses to defend himself must knowingly and intelligently forgo the many benefits of counsel. *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Under Michigan law, three main requirements must be met before a court may grant a waiver of counsel:

> First, the defendant's request must be unequivocal . . . Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. In assuring a knowing and voluntary waiver, the trial court must make the defendant aware of "the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open" . . . Third, the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. [*Adkins*, 452 Mich at 722 (footnotes and citations omitted), quoting *Anderson*, 398 Mich at 368.]

A court must also comply with MCR 6.005(D), which requires that the court advise the defendant of the charge, the possible penalty for the offense, and the risk involved in self-representation, as well as provide the defendant with the opportunity to consult with counsel. *Id.*

"If a judge is uncertain regarding whether any of the waiver procedures are met, [the judge] should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record." *Id.*at 727. This rule "provides a practical, salutary tool to be used to avoid gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel." *People v Russell*, 471 Mich 182, 192; 684 NW2d 745 (2004).

Defendant does not argue on appeal that the trial court failed to engage in the assessment required by the court rules. Rather, defendant claims that the trial court should have allowed him to represent himself until he was actually disruptive, and at that time, it could have required counsel to step in. But, because the trial court had already presided over defendant's first trial and lengthy pretrial proceedings, it had already experienced defendant's disruptiveness first-hand. The trial court did not err by concluding that defendant's previous contempt citations (for threatening a party and using vulgar language) indicated his behavior could impede the functioning of the court. The record is also replete with additional instances of defendant's disruptiveness that the trial court did not cite. At a hearing before the first trial, the trial court held defendant in contempt "[a]t least four times" for failing to take a seat. At a hearing on September 7, 2010, the trial court repeatedly stated to defendant that it had previously ruled on his motion regarding DNA "many times," but defendant continued to question the ruling even though the trial court warned it was out of time for the motion hearing. Even after the trial court ruled that defendant could not represent himself, he continued to speak on the record over the People's objections. In light of the trial court's conclusion that defendant's self-representation could unduly disrupt the trial, and because a court must "indulge every reasonable presumption against waiver" of the right to counsel, we conclude that it was not error to deny defendant's motion to represent himself at his second trial. *Brooks*, 293 Mich App at 537.

D. INEFFECTIVE ASSISTANCE – ALLEGED CONFLICT OF INTEREST

Defendant claims he was denied the effective assistance of counsel because defense counsel Gary Gelow had a conflict of interest. We disagree.

The United States and Michigan constitutions provide that an accused has the right to counsel for his defense. *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). This guaranteed right incorporates a defendant's right to choice of counsel. *Id.* But that right does not "extend to defendants who require counsel to be appointed for them." *United States v Gonzalez–Lopez*, 548 US 140, 151; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *Aceval*, 282 Mich App at 386. Nevertheless, "once the right to counsel exists, there is a correlative right to effective representation that is free from actual conflicts of interest." *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

At his arraignment on November 13, 2008, Judge Patricia Morse indicated that she would appoint Gelow to represent defendant, but defendant stated on the record that Gelow could not represent him because his stepbrother, who had a pending appeal involving Gelow's alleged ineffective assistance, would be a witness in the case. Contrary to defendant's claim on appeal that Gelow was removed for this conflict at that time, Judge Morse did not actually rule on the record that a conflict existed and instead appointed another attorney as a precaution.

"A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests[.] MRPC 1.7(b). Defendant argues that his representation was materially limited by Gelow's own interests—Gelow allegedly held a grudge against defendant's stepbrother for claiming ineffective assistance of counsel in the earlier case and against defendant for raising the issue of a potential conflict of interest at the 2008 arraignment.

"[I]n order to demonstrate that a conflict of interest has violated his Sixth Amendment rights, a defendant 'must establish that an actual conflict of interest adversely affected his lawyer's performance.'" *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980); see also *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004) (A party seeking disqualification of counsel based on a conflict of interest "bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result."). Defendant does not argue how Gelow's alleged conflict affected his performance. Although defendant claimed at his arraignment that his stepbrother was Gelow's former client and a potential witness, defendant does not argue that his stepbrother was not called to testify because of Gelow's representation. Moreover, there is no evidence in the record, and defendant does not argue on appeal, that his stepbrother could have offered testimony that would have even been relevant to this case.

Defendant also fails to point to anything in the record that demonstrates Gelow held a grudge against defendant. Defendant's own statements on the record suggest the contrary—that they had a working attorney-client relationship. When defendant asked to represent himself, he asked for Gelow to serve as "co-counsel." When defendant chose not to attend his own trial, he said, "I would presume that Mr. Gelow would be my mouthpiece . . . within the courtroom, and my legal representative." We conclude that there is no evidence the alleged conflict adversely affected Gelow's representation of defendant and defendant was not deprived of the effective assistance of counsel. *Osborne*, 237 Mich App at 606.

E. INEFFECTIVE ASSISTANCE – FAILURE TO OBJECT

Defendant claims he was denied the effective assistance of counsel because defense counsel failed to object or question Juror #163 when the juror discovered during trial that his son had served as a juror in defendant's first trial that resulted in a mistrial. We disagree.

This Court has ruled that an attorney's decision whether to challenge a juror constitutes trial strategy. *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001).

> Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. *People v Robinson*, 154 Mich App 92, 94-95, 397 N.W.2d 229 (1986). However, as a reviewing court, we "cannot see the jurors or listen to their answers to voir dire questions." *Id*. at 94, 397 NW2d 229. For this reason, this Court has been disinclined to find ineffective assistance of counsel on the basis of an attorney's failure to challenge a juror. *Id*. at 95, 397 NW2d 229. [*People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008).]

We find no basis to second-guess defense counsel's strategy with respect to Juror #163. Defendant failed to move for a *Ginther* hearing, so he cannot provide any evidentiary support to overcome the presumption of trial strategy. *Ginther*, 390 Mich at 443; *Hoag*, 460 Mich a 6.

Furthermore, in light of Juror #163's statements that the failure to disclose was unintentional and he had not discussed the case with his son, his oath of impartiality, and the trial court's instructions to rely on the evidence and not outside information, defendant cannot establish that defense counsel's failure to question Juror #163 further or object to his continued presence on the jury deprived defendant of a fair trial or affected its outcome.

F. OFFENSE VARIABLES 4, 8, AND 10

Finally, defendant claims that the trial court improperly scored 10 points for offense variable (OV) 4, 15 points for OV 8, and 5 points for OV 10. We disagree.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnotes omitted).]

1. OV 4

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim . . . . . .10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim . . . . . .0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

The evidence at trial demonstrated that Dianna suffered a long history of defendant's abuse, which escalated to this incident where defendant drove the Jeep into a tree and attempted to kill them both. Defendant's family and friends also threatened Dianna. She sought treatment at the Women's Resource Center and she was accompanied to the probation department's interview with her counselor. She told the probation department that she is "quite fearful" of defendant and does not feel safe. The trial court found on the record that it could see "how afraid" Dianna was. Because a "victim's expression of fearfulness [alone] is enough to satisfy the statute," *People v Davenport* (*After Remand*), 286 Mich App 191, 200; 779 NW2d 257 (2009), citing *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), the trial court did not err by scoring 10 points for OV 4.

2. OV 8

A score of 15 points is appropriate for OV 8 if, "A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38. To establish asportation, the movement of the victim must "not be incidental to committing an underlying offense." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Asportation does not require force; asportation for the purpose of OV 8 may occur even where the victim voluntarily accompanied the defendant to a place or situation of greater danger. *Id*.

Dianna was driving her Jeep with defendant in the passenger's seat on the way home from the bowling alley. Defendant became angry, took Dianna's keys from the ignition (forcing the car to come to a stop), and "yanked" her out of the vehicle. Defendant then put Dianna in the passenger's seat and drove "crazily" until he accelerated off the road and crashed into the tree.

The trial court found that, until defendant yanked her from the Jeep, she was a willing occupant. But when defendant put Dianna in the car, she was "held captive until the crash occurred." Although the trial court's scoring appears to be based on the "held captive beyond the time necessary to commit the offense" language in MCL 777.38, we find the prosecutor's argument that defendant moved Dianna to a place of greater danger more persuasive. Specifically, defendant moved Dianna from a situation of greater safety in the driver's seat—where she had control of the Jeep even if defendant attempted to cause an accident—to a place of greater danger—where defendant had control of the Jeep and could speed into the trees. The trial court correctly scored 15 points for OV 8. *People v Mayhew*, 236 Mich App 112, 118; 600 NW2d 370 (1999) ("we will not reverse the trial court's decision where it reached the right result for a wrong reason.").

3. OV 10

A score of five points is appropriate for OV 10 if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." The prosecutor argued at sentencing that if defendant and Dianna were of equal size and strength, he would not have been able to "grab her and throw her out of the driver's seat and put her in the passenger's seat," which the trial court found persuasive. The record reflects a size difference between defendant and Dianna: defendant is five feet, ten inches tall and weighs 170 pounds, whereas Dianna is five feet, three inches tall and weighs 115 pounds. We conclude that the trial court did not err by finding that defendant exploited his superior size and strength to trap Dianna in the passenger's side of the Jeep and drive them into the tree. The score of five points for OV 10 was appropriate.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray